

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

DOUGLAS TUGG,	)	Civil No. 07-1112-JE
	)	
Plaintiff,	)	
	)	ORDER
v.	)	
	)	
COMMISSIONER OF SOCIAL SECURITY	)	
ADMINISTRATION, THE SOCIAL SECURITY	)	
ADMINISTRATION,	)	
	)	
Defendants.	)	
_____	)	

JELDERKS, Magistrate Judge:

Plaintiff Cynthia Conley asserts three counts in her complaint in this action brought against the Commissioner of Social Security (the Commissioner) and the Social Security Administration (the agency). The first count is the kind of challenge to a final decision of the Commissioner denying her applications for social security benefits that is ordinarily raised in actions such as this. The second count asserts a Freedom of Information Act (FOIA) claim under 5 U.S.C. § 553, and the third count asserts a claim under the

Fifth and Ninth Amendments to the United States Constitution challenging the agency's reliance on Vocational Expert testimony at the fifth step of the disability evaluation process.

The Commissioner moves to dismiss counts two and three pursuant to Fed. R. Civ. P. 12(b)(1) and (6) and 12(c). The Commissioner contends that this court lacks subject matter jurisdiction over the FOIA claim because plaintiff has not exhausted her administrative remedies and no relevant records have been withheld, and that count three fails to state a colorable Constitutional claim.

I agree. Plaintiff's counsel has raised the claims asserted in counts two and three in several other actions brought against the Commissioner and the agency in this court. Based upon my review of the Commissioner's arguments here<sup>1</sup>, the parties' arguments concerning these claims in other similar actions, and decisions by other judges in this court granting the Commissioner's motions to dismiss these counts in other actions, I conclude that dismissal is appropriate. The issues raised by plaintiff's FOIA and Constitutional claims were addressed at length by the Honorable Ann Aiken in a decision granting the Commissioner's motion to dismiss. Romans v. Astrue, CV No. 06-1331-AA (Slip Op. D. Or. May 16, 2007). Other Judges in this district have uniformly agreed with that decision in granting motions to dismiss the claims at issue here. See D'Annibale v Astrue, CV No. 06-1202-ST (#s 34, 41); Cooley v. Astrue, CV No. 06-1332-KI (# 33); Jaynes v. Astrue, CV No.

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<sup>1</sup>Plaintiff has not filed a response to the motion to dismiss in this action.

06-1771-KI (# 28); Ellis v. Astrue, CV No. 07-0209-MO (# 23);  
Randall v. Astrue, CV No. 07-0037-BR (# 26); Howard v. Astrue, CV  
No. 07-0365-PK (# 18); and Couch v. Astrue, CV No. 07-575-TC (# 13).

The reasoning set out in Judge Aiken's decision is applicable here, and dismissal of counts two and three is appropriate. Plaintiff has failed to exhaust her administrative FOIA remedies, and has failed to assert a colorable constitutional claim.

#### CONCLUSION

Defendants' motion to dismiss counts two and three (# 11) is GRANTED.

DATED this 12<sup>th</sup> day of February, 2008.

A handwritten signature in black ink, appearing to read "John Velderks", written over a horizontal line.

John Velderks  
U.S. Magistrate Judge